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# LIABILITY FOR HONEST MISREPRESENTATION.

IT is common enough in our law to find that several parts of it which have grown up with little regard to each other have nevertheless logical and intimate connection, and that the doctrines laid down in one set of cases are hardly reconcilable with those established in others.

It is impossible that such a situation can be allowed to exist permanently. Some method of harmonizing the different doctrines must be worked out. The simplified forms of pleading which have almost everywhere superseded the earlier forms which were based on sharp distinctions between the various actions known to the common law, make it even more essential to establish harmony than it was where forms of action were clearly distinguished. Then it was possible as a practical matter to lay down a rule as to one action not wholly consistent with the rule established in regard to another. Then, in the language of an acute writer, "Each category was self-sustaining, its existence was its justification."[1] But when the question presented by pleadings is reduced simply to an inquiry whether on a given state of facts a plaintiff is entitled to any relief, it is no longer possible to keep contradictory rules apart.

The law governing misrepresentation furnishes a striking instance of the truth of what has been said. Misrepresentation will call up to a lawyer's mind, primarily, the action on the case for deceit, and the requirements of a proper declaration in that action.

[1] Francis H. Bohlen, 59 Am. L. Reg. 298, 315.

But misrepresentation is legally important in other aspects, and some of them may profitably be compared with the rules established or in dispute in the action for deceit.

## I. Early History of Deceit.

The word "deceit" in the old writ of deceit, and in the action on the case for damages for deceit, based on the earlier writ, seems to have carried to the minds of early lawyers no more definite meaning than the word "fraud" carries to the minds of modern lawyers. The typical cases relate to simulation of the defrauded plaintiff by bringing an action or suffering a recovery, or entering into a bond or recognizance in his name.[2]

An examination of the numerous cases cited in the earlier abridgments under the heading of "Disceit" will convince any one how little the subject, as understood by the early lawyers, had to do with the action for deceit as now understood.

Some cases, however, were included under this heading which ultimately formed the basis of the modern law. These were cases of deceit in the sale of goods by means of a false warranty; and there are also some expressions in the later year books in regard to deceit by false promises, from which the law of special assumpsit was afterwards developed.[3]

But there was no recognition until the case of Pasley *v.* Freeman [4] of any general doctrine that statements false and known to be such by the speaker made to induce action by another were ground of liability. The contrary, indeed, is directly stated in the well-

[2] "Besides the special action on the case, there is also a peculiar remedy, entitled an action of deceit, (F. N. B. 95) to give damages in some particular cases of fraud, and principally where one man does anything in the name of another, by which he is deceived or injured; (Law of *nisi prius*, 30) as if one brings an action in another's name, and then suffers a nonsuit, whereby the plaintiff becomes liable to costs: or where one obtains or suffers a fraudulent recovery of lands, tenements, or chattels, to the prejudice of him that hath right. As when by collusion the attorney of the tenant makes default in a real action, or where the sheriff returns that the tenant was summoned when he was not so, and in either case he loses the land, the writ of *deceit* lies against the demandant, and also the attorney or the sheriff and his officers; to annul the former proceedings, and recover back the land. (Booth, real actions, 251; Rast. Entr. 221, 222.)" 3 Bl. Comm. 165.

[3] Ames, History of Assumpsit, 2 Harv. L. Rev. 1, 8 *et seq.*

[4] 3 T. R. 51 (1789).

known case of Chandelor *v.* Lopus,[5] less than a century earlier. And where, as in a leading case like Pasley *v.* Freeman, a learned judge dissents, it not infrequently happens, as in that case, that the dissenter expresses the early law, and objects to make any advance from it.

Since the decision of Pasley *v.* Freeman it has not been doubted that one who makes a statement of fact which he knows to be false for the purpose, or apparent purpose, of inducing another to act, is liable for the damage caused by the action which he induced.

## II. Warranty of Title.

The early authorities on the law of warranty which furnished the foundation for the decision of Pasley *v.* Freeman have also been the basis for the subsequent development of the law of warranty, and in this subsequent development the necessity of expressly warranting a statement to be true in order to make out an actionable case has been gradually done away with. This process was first completed in regard to warranty of title. In Dale's Case,[6] decided in 1585, the plaintiff sued on the ground that the defendant had sold as his own certain goods to the plaintiff which in fact belonged to another. Two judges held that the action did not lie because *scienter* was not alleged, but added, "if he had affirmed that they were his own goods then the action would lie." It may be inferred, therefore, that these judges were of opinion that either *scienter* without affirmation by the defendant, or affirmation without *scienter*, was enough. The third judge (Anderson), however, thought the action should lie. "For it shall be intended that he that sold had knowledge whether they were his own goods or not."

Anderson, J., was apparently prepared to adopt the modern doctrine of implied warranty of title, reasoning that the mere sale of the goods necessarily involved an affirmation. In another decision in the following reign[7] it was held that a seller out of pos-

[5] Cro. Jac. 4. This case is chiefly familiar in the law of warranty. But the court not only held that the defendant would not be liable for selling the stone in question affirming it to be a bezoar stone, unless he warranted it to be such, but further said: "and although he knew it to be no bezoar stone, it is not material." But see comment upon this sentence in 14 App. Cas. 357.

[6] Cro. Eliz. 44.

[7] Roswel *v.* Vaughan, Cro. Jac. 196.

session who made no affirmation of title was not liable to one who bought from him though it turned out the seller had no title. Another case in the same reign [8] still leaves it uncertain whether the court regarded *scienter* as necessary. Apparently *scienter* was not alleged, but on motion to arrest judgment for plaintiff the court seems to have assumed the allegation, saying, "the sale of goods which were not his own, but affirming them to be his goods, knowing them to be a stranger's, is the offense and cause of action," and the motion was denied. In 1689, however, Lord Holt decided that one who sold oxen in his possession, affirming they were his, was liable to the buyer if in fact they were not. *Scienter* on the part of the defendant was held an unnecessary allegation, though in one report of the case [9] it was said that the objection that no such allegation was made might have been good upon demurrer, but after verdict the declaration was well enough. Any doubt as to Lord Holt's opinion which this decision might leave was set at rest in 1700 by the case of Medina *v.* Stoughton.[10] On demurrer to a plea in which the defendant set up that he bought the goods in question in good faith and sold them in good faith, Holt said, "the plea is ill and the action well lies. Where a man is in possession of a thing which is a colour of title an action will lie upon a bare affirmation that the goods sold are his own."

Since these decisions it has not been doubted that an affirmation of title, though made in good faith by a seller, renders him liable; and the law has taken the further step that even without such an affirmation an obligation will be implied, at least if the seller was in possession when the sale took place.[11]

## III. Warranty of Quality.

In regard to warranty of quality the law has followed a similar path, although somewhat more slowly. From cases at the beginning of the nineteenth century [12] it is made clear that by that time

[8] Furnis *v.* Leicester, Cro. Jac. 474.

[9] Cross *v.* Garnet, 3 Mod. 261; s. c. *sub nom.* Crosse *v.* Gardner, 1 Show. *68; Carthew, 90.

[10] 1 Ld. Raym. 593; s. c. 1 Salk. 210.

[11] See Williston, Sales, sec. 218.

[12] Yates *v.* Pym, 6 Taunt. 446; Bridge *v.* Wain, 1 Stark. 504; Jendwine *v.* Slade, 2 Esp. 572; Power *v.* Barham, 4 A. & E. 473.

it had become established that it was not necessary, in order to render the seller liable as a warrantor, that the word "warrant," or any word of promise, should be used. This was not such a departure from early law as it might now seem, for even in the early law, when the use of the word "warrant" seems to have been essential, the gist of the action seems to have been regarded as the deceit caused by a misrepresentation deliberately made to induce a bargain. How little any idea of promise was regarded as involved in a warranty may be inferred from the early rule that there could be no warranty as to a future event.[13] In other words, a warranty must be a misrepresentation of an existing fact in precisely the same way that a fraudulent misrepresentation must now be in order to furnish a basis for action.

At the present day it is law, nearly, if not quite, everywhere where the common law prevails, that any representation of fact as to the quality of the goods made for the apparent purpose of inducing the buyer to purchase them amounts to a warranty. A certain confusion has, indeed, been caused by a statement of Buller, J., in Pasley *v.* Freeman. That judge said, "It was rightly held by Holt, C. J., cited in the subsequent cases, and has been adopted ever since, that an affirmation at the time of a sale is a warranty provided it appears on evidence to have been so intended." In fact, in the decisions referred to, Holt, if the report may be trusted, said nothing whatever about the necessity of intention; that requirement was interpolated by Buller himself. Many of the best courts in this country have in terms rejected any such requirement for making out an express warranty;[14] and even in jurisdictions where the requirement of intention is still laid down, intent to warrant is not used as the equivalent of intent to contract: it means intent to affirm as a fact.[15] Pennsylvania seems to be the only State where it is clearly held that an intent to enter into a contract to

[13] 3 Bl. Comm. 165.

[14] See Williston, Sales, sec. 201.

[15] "In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case it is a warranty, in the latter not." De Lassalle *v.* Guildford, [1901] 2 K. B. 215, 221. The statement was borrowed from Benjamin, Sales, 5 Eng. ed., 659, and has also been approved by American courts. Carleton *v.* Jenks, 80 Fed. 937 (C. C. A.); Roberts *v.* Applegate, 153 Ill. 210.

answer for the truth of a statement is a necessary element for establishing an express warranty.[16]

There can be no doubt now, of course, that a seller may promise, in consideration of the purchase of goods from him, that he will be answerable for their present, or, indeed, for their future condition. Nor is it open to doubt that a seller who in terms warrants the goods which he sells, thereby enters into such a contract. But when a seller is held liable on a warranty for making an affirmation of fact in regard to goods in order to induce their purchase, to hold that such an affirmation is a contract is to speak the language of pure fiction. In truth, the obligation imposed upon the seller in such a case is imposed upon him not by virtue of his agreement to assume it, but because of a rule of law applied irrespective of agreement. The obligation is quasi-contractual, inasmuch as the remedy of assumpsit is allowed for its enforcement. The confusion of thought as to the nature of the obligation seems to be in great measure due to the allowance in modern times of this remedy for breach of any warranty, whether in reality constituting a contract or only a representation. But assumpsit was not allowed as a remedy for breach of warranty until near the close of the eighteenth century.[17] And a declaration in tort without an allegation of *scienter* is still generally regarded as permissible.[18] These decisions are not, as is sometimes supposed, a mere following of early authority after the reason for the earlier rule has ceased to exist; they involve a recognition of the fact that a warranty is a hybrid between tort and contract. This was clearly recognized by Blackstone,[19] who classifies warranties with contracts "implied by reason and construction of law." Under this heading, together with warranties, he inserts a statement of such obligations as this:

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[16] Holmes *v.* Tyson, 147 Pa. St. 305; Williston, Sales, sec. 199.

[17] The first decision reported permitting it is Stuart *v.* Wilkins, 1 Doug. 18.

[18] Shippen *v.* Bowen, 122 U. S. 575, citing Gresham *v.* Postan, 2 C. & P. 540; House *v.* Fort, 4 Blackf. (Ind.) 293, 295; Hillman *v.* Wilcox, 30 Me. 170; Osgood *v.* Lewis, 2 Har. & G. (Md.) 495, 520; Lassiter *v.* Ward, 11 Ired. L. (N. C.) 443, 444; Trice *v.* Cochran, 8 Gratt. (Va.) 442, 450. To the same effect are Farrell *v.* Manhattan Market Co., 198 Mass. 271; Erie City Iron Works *v.* Barber, 106 Pa. St. 125; Place *v.* Merrill, 14 R. I. 578; Piche *v.* Robbins, 24 R. I. 325; Watson *v.* Jones, 41 Fla. 241; Tyler *v.* Moody, 111 Ky. 191. See, however, the contrary decisions, Mahurin *v.* Harding, 28 N. H. 128; Caldbeck *v.* Simanton, 82 Vt. 69; Slack *v.* Bragg, 76 Atl. 148 (Vt.); Pierce *v.* Carey, 37 Wis. 232.

[19] 3 Comm. 163–165.

"If any one cheats me with false cards or dice, or by false weights and measures, or by selling me one commodity for another, an action on the case also lies against him for damages, upon the contract which the law always implies, that every transaction is fair and honest." [20]

To any one who still inclines to accept as fact the fiction of a contract where a warranty is based on a seller's misrepresentation of the quality of his goods, the argument may be put in this way. If it creates a contract for A to say of his horse when he sells it in order to induce the purchase, "the horse is sound," why is it not equally a contract if B should say precisely the same thing in order to induce a sale of A's horse? If A's words to a buyer really mean "if you will buy my horse I undertake to be responsible for the truth of my assertion that the horse is sound," why does it not equally follow that if B should make similar statements to the buyer to induce the sale of A's horse that the same construction of an offer should be put upon them? A recent decision of the Supreme Court of South Carolina [21] furnishes an interesting comparison in this connection with the well-known case of Derry *v.* Peek.[22] In the latter case the plaintiff was induced to take shares in the company by a misrepresentation of the directors in regard to a right which they stated had been given by special act of Parliament to use steam or other mechanical motive power. In the South Carolina case the plaintiff was induced to buy shares of stock by representations of the seller as to the corporate assets and liabilities. It can hardly be thought that the representations in these two cases are to be distinguished on any other ground than that one was made by a seller, and the other by persons interested in the taking of shares by the plaintiff but not interested as sellers. As a pure question of construction of language, surely if the words in one case amount to an offer to contract, they do so in the other case. In truth, it is submitted they are not words of offer. The only reasonable inference that can be drawn in either case is that representations of fact were made for the purpose of inducing the plaintiff to purchase shares. In the American case it was held that *scienter* need not be alleged or proved, the court saying:

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[20] 3 Bl. Comm. 164, citing 10 Rep. 56.
[21] Iler *v.* Jennings, 68 S. E. 1041 (S. C.).
[22] 14 App. Cas. 337.

"Use of a statement of the corporate business by a director negotiating a sale of his stock therein could not be regarded as other than a direct affirmation of its correctness, and, if it was delivered for the purpose of assuring the buyer of the truth of the facts therein stated, and to induce him to purchase, and the buyer purchases in reliance thereon, there is an express warranty." [23]

The English case held that the directors were not liable because *scienter* was not proved; yet the English decisions on the law of warranty make it evident that the South Carolina Court was following clear English precedents.

An honest misrepresentation, then, made by a seller in regard to the goods sold in order to induce a sale, will render him liable.

## IV. Warranty by an Agent of his Authority.

Entirely analogous to the law of warranty in the sale of goods is the warranty which the law imposes upon an agent that he is authorized to act as such. The agent either expressly, or by necessary implication of fact, represents that he is an authorized agent, and it was decided in Collen *v.* Wright [24] that the agent was liable as a warrantor. Cockburn, J., dissented from the decision of the court, and many legal thinkers have agreed with his dissent on the ground that the plaintiff should not have been allowed to recover unless the agent knew of the falsity of his representations; but Collen *v.* Wright has been followed generally in this country,[25] and has been affirmed recently by the House of Lords in England.[26] On this occasion the case of Derry *v.* Peek was pressed upon the attention of the court and somewhat impatiently brushed aside by Lord Halsbury, who delivered the principal opinion, on the ground that Derry *v.* Peek was an action for deceit and in the case at bar the action was contractual. But Lord Halsbury hardly asserted that the contract in such a case is other than a fiction of law imposed upon the agent because of his misrepresentation.[27]

[23] 68 S. E. 1041, 1044.

[24] 7 E. & B. 301, 8 E. & B. 647.

[25] Mechem, Agency, sec. 545.

[26] Starkey *v.* Bank of England, [1903] A. C. 114.

[27] "That which does enforce the liability is this — that under the circumstances of this document being presented to the bank for the purpose of being acted upon, and being acted upon on the representation that the agent had the authority of the prin-

Here again is a case where honest misrepresentation will render a person liable. In one respect, moreover, the doctrine in regard to an agent's warranty has been advanced by the late decision of the House of Lords beyond the analogy of warranty in the law of sales, and beyond the previous authority of Collen *v.* Wright. The defendant in Starkey *v.* Bank of England did not purport to enter into a contract on behalf of his principal with the injured plaintiff. The defendant was a stockbroker, and, as such, presented to the Bank of England, in good faith, at the request of a customer, a power of attorney purporting to be signed by the owner of certain consols, and thereby induced the bank to transfer the consols to a third person. In fact, one of the signatures on the power of attorney was forged.

## V. Estoppel in Pais.

Another doctrine which must be considered in this connection is that of estoppel *in pais*. This doctrine has received very wide application in recent years, and has been extended far beyond the limits formerly set for it. Pickard *v.* Sears [28] is usually regarded as the leading authority on the subject. In that case it was stated as a necessary element that the misrepresentation should be "wilfully" made. It was not long, however, before the use of this word was explained in such a way as to deprive it of its natural meaning. In Freeman *v.* Cooke [29] Parke, B., said:

"By the term 'wilfully,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth."

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cipal, which he had not, that does import an obligation — the contract being for good consideration — an undertaking on the part of the agent that the thing which he represented to be genuine was genuine. That contains every element of warranty." [1903] A. C. 114, 118.

[28] 6 A. & E. 469.

[29] 2 Ex. 654, 663.

Long before the case of Pickard *v.* Sears certain equity cases had illustrated the doctrine and applied it, though not under the name of estoppel.[30] At the present day, though there are many expressions still made use of which seem to indicate that either fraud or culpable negligence is an essential element in estoppel, it is certain that positive statements of fact as to matters upon which the speaker should be correctly informed may give rise to an estoppel though there is neither fraud nor negligence. Thus Lord Esher says:

"If a man either by express terms or by conduct makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts." [31]

More explicitly the Massachusetts court has said:

"The usual form of expressing the situation which founds an estoppel *in pais* has been that followed in the rulings given, in which, as in many of the older decisions, it is said that an intent to deceive is a necessary element. . . . But under this formula the jury were not prohibited from finding the intention and the estoppel, if, without more, the plaintiff spoke or acted falsely, knowing or having cause to believe that his words or conduct reasonably might influence the defendant's action. The more modern statement, that one is responsible for the word or act which he knows, or ought to know, will be acted upon by another, includes the older statement that the estoppel comes from an intention to mislead." [32]

The effect of Derry *v.* Peek on the doctrine of estoppel was pressed upon the Court of Appeal soon after the decision of that case, but it was emphatically stated that the decision had no effect upon

[30] See opinion of Kay, L. J., Low *v.* Bouverie, [1891] 3 Ch. 82, 107.

[31] Carr *v.* The London & Northwestern Railway Co., L. R. 10 C. P. 307, 317, quoted with approval in Tomkinson *v.* Balkis Consolidated Co., [1891] 2 Q. B. 614, 619. See also the definition of Lord Blackburn in Burkinshaw *v.* Nicolls, 3 App. Cas. 1004, 1026, quoted with approval in Tomkinson *v.* Balkis Consolidated Co., [1891] 2 Q. B. 614, 623.

[32] Stiff *v.* Ashton, 155 Mass. 130, 133. See also Nickerson *v.* Massachusetts Title Ins. Co., 178 Mass. 308; Westlake *v.* Dunn, 184 Mass. 260. Decisions to the same effect might easily be multiplied.

the doctrine of estoppel as previously understood.[33] Lindley, J., explained the matter thus: "Estoppel is not a cause of action — it is a rule of evidence which precludes a person from denying the truth of some statement previously made by him."[34] And in the same case Bowen, L. J., repeats this formula in substance: "Estoppel is only a rule of evidence; you cannot found an action upon estoppel."[35]

It is amusing to reflect on the ease with which Lord Bowen would have disposed of such a fiction if the harmonizing of decisions had required instead of forbidden him to do so. Estoppel is a rule of evidence in the same way that conclusive presumptions are rules of evidence. An estoppel, like a conclusive presumption, is a rule of substantive law masquerading as a rule of evidence. To speak of conclusive evidence of something admittedly false may be a useful formula, but it disguises the truth. An estoppel is in effect a conclusive admission of the truth of a non-existent fact. This supposed fact may be essential either for a cause of action, for a defense, or for a replication. As the fact is non-existent it is obvious that the admission and nothing else supplies the requirement which otherwise would be lacking. If the admitted non-existent fact alone creates a cause of action, defense, or replication, the admission or estoppel is the sole foundation, if other facts are needed in conjunction, a partial foundation of the cause of action, defense, or replication.

An estoppel then may be, and frequently is, either the sole or the main foundation of a cause of action. When a warehouseman states to an intending purchaser in answer to an inquiry that the seller has a certain quantity of goods stored in the warehouse, and relying on that statement the purchaser completes the bargain, the warehouseman is estopped to deny the truth of his statement.[36] The only essential facts in the purchaser's case when he sues the warehouseman are the misrepresentation, his own reliance upon it, and perhaps a demand and refusal; and the allegation of these facts constitutes a perfect cause of action, wherever reformed pleading

[33] Tomkinson *v.* Balkis Consolidated Co., [1891] 2 Q. B. 614; Low *v.* Bouverie, [1891] 3 Ch. 82.

[34] Low *v.* Bouverie, [1891] 3 Ch. 82, 101.

[35] Low *v.* Bouverie, [1891] 3 Ch. 82, 105.

[36] Gillett *v.* Hill, 2 Cr. & M. 530. See also Knights *v.* Wiffen, L. R. 5 Q. B. 660, and cases cited in Williston, Sales, sec. 418, note 46.

has reached such a state that nothing further is required of the plaintiff than to state the material facts upon which his claim is founded. Nor is it material that the warehouseman was neither fraudulent nor negligent.[37] His statement relates to a matter about which he must have accurate knowledge at his peril, or refrain from talking about it. So where a bailee issues a receipt for goods never received, and a purchaser relies upon the statement in the receipt that goods have been received.[38] Or where a bailee fails to take up a receipt or bill of lading which mercantile usage requires him to take up where the goods behind the document are delivered, and in consequence a purchaser of the outstanding document is deceived by the representation which it contains that the carrier still holds the goods described and is induced to buy the document, or to advance money on the faith of it.[39] Or where a corporation issues a certificate of stock to one who is not a shareholder, and a subsequent purchaser, relying upon the misrepresentation of the certificate, buys it.[40] Or where a trustee applied to for information as to the property of his *cestui que trust* by one proposing to lend money to the latter, gives misinformation, reliance upon which causes damage to the lender.[41] In all these cases, and their number might easily be increased, a cause of action exists because of damaging misrepresentation, certainly without regard to any fraudulent intent, and probably without regard to any other negligence than necessarily exists when a person whose position qualifies him to have accurate knowledge about a matter makes a misstatement in regard to it.

It is difficult to see how the law of estoppel and the doctrine of Derry *v.* Peek can permanently be kept in separate compartments

[37] It may seem difficult to suppose that such a situation can arise without negligence, but the English decisions seem to show the possibility, holding, as they do, that the warehouseman is estopped by such a representation when the only lack of accuracy in it is the omission to state that the seller has mingled in a mass a quantity of goods larger than that which the buyer proposes to purchase.

[38] Williston, Sales, sec. 419.

[39] *Ibid.* sec. 424.

[40] Tomkinson *v.* Balkis Consolidated Co., [1891] 2 Q. B. 614; *In re* Ottos Kopje Diamond Mines, [1893] 1 Ch. 618.

[41] Burrowes *v.* Lock, 10 Ves. 470; Brownlie *v.* Campbell, 5 App. Cas. 925, 953. In Low *v.* Bouverie, [1891] 3 Ch. 82, the Court of Appeal did not dispute the correctness of this doctrine, but construed the representation made by the trustee as amounting to no more than a statement of the trustee's belief, not a positive assertion of fact.

when law and equity are fused and pleading reduced to a mere statement of the facts of the case. An inquiry which may be made in this connection is what would have been the result of an action against the defendants in Derry *v.* Peek for failing to utilize as directors, on behalf of the corporation whose shares the plaintiff had bought, the right to use steam as a motive power for its cars. It may be assumed that the value of the property would have been enhanced by the use of such motive power and that the directors, therefore, would have been liable if they had failed to make use of it, had they been legally authorized to do so. Could the defendants, who as directors issued a prospectus stating that they had such power, be heard to deny, subsequently, that their statement was correct? Would they not be estopped? If so, then allegations by the plaintiff of the defendants' statement, whether accurate or not, and whether made in good faith or not, and of his own reliance upon it, would be sufficient basis for a judgment in his favor.

## VI. Rescission for Misrepresentation.

In some criticisms of the doctrine of the liability for fraud established in England by Derry *v.* Peek, the doctrine of courts of equity as to what constitutes fraud has been compared with the rule of Derry *v.* Peek, and it has been urged that courts of equity have not purported to give a new and different definition of fraud from that supposed to be held by courts of law; that fraud is the same whether relief sought for it is legal or equitable. But the redress which equity gives for fraud is rescission, and as a distinction may well be taken between rescinding a bargain for innocent misrepresentation and holding the person who makes an innocent misrepresentation liable in damages, it does not seem that any forcible argument against the doctrine of Derry *v.* Peek, whatever criticism may be made of that doctrine, can be based on the rule established by equity courts in cases where a right of rescission was the only question involved.

## VII. Actions for Damages for Misrepresentation.

Even in actions in form claiming damages for deceit there is much authority to support the proposition that a defendant may

be liable for honestly misrepresenting facts in regard to which he might reasonably be supposed to be peculiarly well informed. In Cooley on Torts it is laid down that a person is liable for deceit when he "supposed his representations to be true, but had no reason for any such belief, and nevertheless made them positively as of known facts, and induced the other to act upon them." [42] This statement is supported by many authorities.

In 1827 Chief Justice Best, in referring to the basis of liability on a warranty by false affirmation, said:

"It has been said, that is because there is a breach of *contract* to rest the action on, and that there is no contract in this case. This is not the true principle; it is this; he who affirms either *what he does not know to be true*, or knows to be false, to another's prejudice and his own gain, is both in morality and law guilty of falsehood, and must answer in damages." [43]

Doubtless it is clear enough to-day that the law of England sanctions no such broad rule, but it is equally clear that American courts which should refuse to follow the decision of the House of Lords in Derry *v.* Peek would have good old English authority behind them. And many American courts of the highest standing at least go much beyond the present limits of the English law. Thus the Supreme Court of Massachusetts in speaking of an action for deceit in representing a horse to be sound has said:

"It is not always necessary to prove that the defendant knew that the facts stated by him were false. If he states, as of his own knowledge, material facts susceptible of knowledge, which are false, it is a fraud which renders him liable to the party who relies and acts upon the statement as true, and it is no defense that he believed the facts to be true. The falsity and fraud consists in representing that he knows the facts to be true, of his own knowledge, when he has not such knowledge." [44]

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[42] Vol. 2 (3 ed.), 956.

[43] Adamson *v.* Jarvis, 4 Bing. 66. In this case the defendant, who had delivered goods to the plaintiff for the latter to sell as auctioneer, was held liable for his, the defendant's, statement that he was entitled to dispose of them.

In the second edition of Saunders on Pleading and Evidence, at page 60 it is said that "in an action for falsely representing a third person fit to be trusted, a *scienter* must be alleged and proved; though indeed the word 'fraudulently' might be a sufficient allegation in this respect, especially after verdict, Willes, 584. But in an action on the case for fraud, or on misrepresentation of any kind, an express warranty or *scienter* need not be alleged, nor proved if alleged."

[44] Litchfield *v.* Hutchinson, 117 Mass. 195, 197.

It is to be observed that the court makes no inquiry as to whether the defendant honestly believed that he knew the facts — it is enough that he asserted that he knew them; and indeed it is not necessary to satisfy the requirement laid down by the court that the defendant should assert in terms that he knew what he stated to be true — it is enough that he positively asserted that the horse was sound and that the unsoundness of the horse was readily ascertainable. It might well be true not only that the defendant believed the horse to be sound, but that, if his state of mind is to be regarded, he felt perfectly positive of it and even had reasonable grounds for his belief. Nevertheless he would be liable under the instructions approved by the court. That the Massachusetts court is prepared to accept these inferences is apparent from its later decisions. In Chatham Furnace Co. *v.* Moffatt [45] the court said:

"The fraud consists in stating that the party knows the thing to exist when he does not know it to exist; and if he does not know it to exist, he must ordinarily be deemed to know that he does not."

And in its last decision on the subject:

"Due diligence to ascertain the truth in regard to statements made as of matters of fact within one's own knowledge is not enough to relieve the maker of them of liability if they are false and relied upon as true, and the person to whom they are made suffers loss thereby." [46]

Many decisions in Massachusetts and in other jurisdictions go as far, or nearly so, in holding a defendant liable irrespective of good or bad faith, for making a positive false statement as to which he had special means of knowledge.[47]

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[45] 147 Mass. 403, 404.

[46] Huntress *v.* Blodgett, 206 Mass. 318, 324.

[47] Lehigh Zinc & Iron Co. *v.* Bamford, 150 U. S. 665, 673, "where the representations are material and are made by the vendor or lessor for the purpose of their being acted upon, and they relate to matters which he is bound to know, or is presumed to know, his actual knowledge of them being untrue is not essential."

Hindman *v.* First Nat. Bank, 112 Fed. 931 (C. C. A.); Munroe *v.* Pritchett, 16 Ala. 785; Jordan *v.* Pickett, 78 Ala. 331; Prestwood *v.* Carlton, 162 Ala. 327, 333. "The law imposes the duty of ascertaining the truth of statements made in transactions as to material matters, and requires that, if the statements are false, they shall be made good, and that the party shall not take advantage of his own wrong. (Jordan *v.* Pickett, 78 Ala. 331.) One who is negotiating a trade must not recklessly or even innocently assert that as a fact which is untrue if such asserted fact be to any extent an inducement to the other party to enter into the contract. Honest belief in the

Undoubtedly the doctrine that one who positively states a fact as of his own knowledge is liable, if the statement is false, has been

truth of the statement of such fact, while it exculpates from moral fault, does not relieve from the legal liability to make it good."

Goodale *v.* Middaugh, 8 Colo. App. 223, 231; Water Commissioners *v.* Robbins, 82 Conn. 623; Watson *v.* Jones, 41 Fla. 241, 254. "When it is shown that the statement was material and false, and that the defendant's situation or means of knowledge were such as to make it incumbent upon him as a matter of duty to know whether the statement was true or false, the conclusion is almost irresistible that he did know that which his duty required him to know. For this reason the law conclusively presumes from the existence of these facts that defendant had actual knowledge of the falsity of his statement, or, more properly speaking, proof of these facts is sufficient to sustain a charge of actual knowledge, dispensing with further proof upon that subject, and admitting no proof to rebut the fact of actual knowledge, but only proof to rebut the existence of the facts from which such actual knowledge is inferred."

Upchurch *v.* Mizell, 50 Fla. 456; Ward *v.* Trimble, 103 Ky. 153, 159. "The president of a bank, as between himself and parties not with equal means of knowledge of the bank's condition, must be held to know the condition of the bank and consequently whether the statement published as to its condition is true or false. In such cases the presumption of knowledge by the president cannot be avoided by showing that he, in fact, did not know. This harsh rule does not apply, however, to the director of a bank. In an action against a bank, it would not be allowed to say, that its directors were ignorant of the bank's condition, for in such case the law presumes that the directors know every entry made by the subordinate officers; but in an action against the director, personally, no such presumption exists. (Bank *v.* Caperton, 87 Ky. 306.) However, if this bank statement of December 31, 1887, as published and circulated over the signature of the directors, with their knowledge, it would be *prima facie* evidence that they knew whether the same was true or false; but as to a director, he may by proof rebut this presumption of knowledge as to the truth of the statement, which, as said above, the president would not be permitted to do."

Trimble *v.* Reid, 19 Ky. L. Rep. 604; Braley *v.* Powers, 92 Me. 203, 209. "It is not always necessary to prove that the defendant knew that the facts stated by him were false. 'If he states as of his own knowledge material facts susceptible of knowledge, which are false, it is a fraud which renders him liable to the party who relies and acts upon the statement as true, and it is no defense that he believed the facts to be true. The falsity and fraud consist in representing that he knows the facts to be true of his own knowledge, when he has not such knowledge.' (Litchfield *v.* Hutchinson, 117 Mass. 195.) And in Cole *v.* Cassidy, 138 Mass. 437, it was held that under such circumstances the defendant would be liable, although he believed and had reasonable cause to believe his representations to be true."

Atlas Shoe Co. *v.* Bechard, 102 Me. 197, 203; Phelps *v.* G. C. & C. R. R. Co., 60 Md. 536 (*cf.* Cahill *v.* Applegarth, 98 Md. 493); Fisher *v.* Mellen, 103 Mass. 503; Chatham Furnace Co. *v.* Moffatt, 147 Mass. 403; Weeks *v.* Currier, 172 Mass. 53, 55; Arnold *v.* Teel, 182 Mass. 1, 4; Adams *v.* Collins, 196 Mass. 422; Aldrich *v.* Scribner, 154 Mich. 23; Bullitt *v.* Farrar, 42 Minn. 8 (see also Riggs *v.* Thorpe, 67 Minn. 217; Charles P. Kellogg Co. *v.* Holm, 82 Minn. 416); Sims *v.* Eiland, 57 Miss. 83, 85. "The second plea, which avers in substance that the defendants 'honestly believed' their representation to be true when they made it, was a sufficient answer to the declaration, and the demurrer to it was properly overruled. The replication, that the defendants had no reasonable ground to believe that their representation was true when they

somewhat confused with the doctrine that if no reasonable ground existed for the statement, it is evidence of fraud, or is evidence enough to make out a *primâ facie* case of fraud; but the decisions in Massachusetts and other jurisdictions here relied on certainly go farther than this. A somewhat more subtle line of reasoning, however, may be suggested by those who believe the cases on deceit as a tort are in the main consistent. It may be urged that the authorities, including Derry *v.* Peek, are agreed that a statement made "recklessly, careless whether it be true or false," [48]

made it, is an argumentative denial that they did believe it, for one cannot believe what he has no reasonable ground to believe. . . . The only question is, whether a replication traversing the plea is good. Clearly it is." (*Cf.* Vincent *v.* Corbett, 94 Miss. 46).

Phillips *v.* Jones, 12 Neb. 213; Johnson *v.* Gulick, 46 Neb. 817, 821; Gerner *v.* Mosher, 58 Neb. 135, 154. "The defendants in the present suit, who as directors attested the reports made by the Capital National Bank to the comptroller of the currency, by such act vouched for, or certified to, the absolute truthfulness of the statements therein contained, and not that the report was correct so far as the directors knew or had been advised by the proper performance of their duties as directors. The means of information, this record shows, were accessible to them. It was their duty to know whether the reports were correct or not."

Tate *v.* Bates, 118 N. C. 287; Houston *v.* Thornton, 122 N. C. 365, 373. "There is no allegation or proof that these defendants were guilty of fraud or had actual knowledge of the frauds, or that they knew the representations in the published reports were fraudulent. On the contrary, the basis of the action is that these defendants were men of high character, who would not participate in or connive at fraud, and for that very reason when the reports of the bank were published, the plaintiff, relying on the well-known character of these defendants, trusted implicitly to the correctness of such statements and was misled, to her damage $1100, into buying the eleven shares of the capital stock of the bank, which were wholly worthless, and entailed liability on her besides. It is no answer to this to say that the defendants themselves were also misled as to the condition of the bank and suffered loss. They had opportunity to know the true condition of the bank. They ought to have known. It was their duty to know. They should not have permitted statements to go out upon their authority as to the condition of the bank which were untrue, and relying upon which the plaintiff was led into loss. It may be a hardship upon these defendants, but it would be a greater hardship upon the public and destructive of confidence in banks if directors of good character, whose names are useful in drawing patronage, are absolved from responsibility for fraudulent representations whereby the public are duped and defrauded, because such directors had no actual knowledge of the frauds and did not participate in them. 'Ignorance will not excuse when they had means of knowledge.'"

Whitehurst *v.* Life Ins. Co., 149 N. C. 273; Howe *v.* Martin, 23 Okl. 561; Bower *v.* Fenn, 90 Pa. 359; McCabe *v.* Desnoyers, 20 S. Dak. 581; Shea *v.* Mabry, 1 Lea (Tenn.) 319, 342; Seale *v.* Baker, 70 Tex. 283; Giddings *v.* Baker, 80 Tex. 308; Oneal *v.* Weisman, 39 Tex. Civ. App. 592; Barclay *v.* Deyerle, 116 S. W. 123 (Tex. Civ. App.); Krause *v.* Busacker, 105 Wis. 350.

[48] Lord Herschell in Derry *v.* Peek, 14 App. Cas. 337, 375.

is fraudulent. This idea was expressed by Lord Blackburn in the House of Lords some years before the decision of Derry *v.* Peek: "If when a man thinks it highly probable that a thing exists, he chooses to say he knows the thing exists, that is really asserting what is false — it is positive fraud." [49] Now one who asserts as a fact something of which he has no positive knowledge, not only asserts that the fact is as he states — something which he may well believe — but also impliedly that he knows it is so or that he has an adequate basis of information. If this is not true he is asserting a falsehood as much as if he did not believe the truth of his express statement.[50]

This line of reasoning would probably be accepted by most courts, and in many decisions it is followed under one mode of statement or another without being continued to the inquiries to which it naturally leads, namely, Does it make any difference that the speaker believes that he has knowledge or that he has an adequate basis of information when in fact he has not, or that he speaks believing what he says to be true, but without much reflection and without consciousness of the paucity of his information? It is a merit of Derry *v.* Peek that the House of Lords at least makes its position clear. In its view these inquiries are of vital importance. In each opinion this is made evident — perhaps least so in the elaborate opinion of Lord Herschell, but even his language seems to leave no doubt that he believed that conscious dishonesty of the defendant must be shown.

On the other hand, in the American cases cited above the court proceeded upon the theory that the plaintiff must recover if the defendant asserted as matter of his own knowledge something which in fact he did not know, or for which he had no reasonable basis of belief.

In some jurisdictions the court squarely states that the defendant is liable for the consequences of a positive misstatement of facts as to which he ought to be informed, or at least is liable if he had no reasonable ground for believing the truth of his statement. In others the same principle is veiled under the guise of a conclusive presumption, but in all of them, under the rules enunciated by the courts, a defendant may be held liable though in fact

[49] Brownlie *v.* Campbell, 5 App. Cas. 925, 953.

[50] See Pollock, Fraud in British India, 43.

he honestly believed not only that the statement that he made was true, but also that he knew it to be true.[51] In some of the cases cited it may be that the actual facts involved did not require so extreme a statement, but in most of them the point was necessarily involved in the decision of the court. In Michigan the court has gone perhaps as far as anywhere in holding a defendant liable for innocent misrepresentation. It is broadly laid down

"that the doctrine is settled here, by a long line of cases, that if there was in fact a misrepresentation, though made innocently, and its deceptive influence was effective, the consequences to the plaintiff being as serious as though it had proceeded from a vicious purpose, he would have a right of action for the damages caused thereby either at law or in equity." [52]

This doctrine, however, has been later so far limited as to cover only cases where the profit of the misrepresentation enures to the benefit of the defendant, or he is a party to a contract with the plaintiff induced by the misrepresentation.[53] No such limitation however is contained in the provision of the California Civil Code: [54]

"A deceit within the meaning of the last section is either . . . 2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true."

This provision has been adopted in identical words in Montana,[55] North Dakota,[56] and South Dakota.[57] But it will be observed that under such a statute innocent misrepresentation must be at least accompanied by carelessness to afford a cause of action.

Undoubtedly there are many decisions and more *dicta* opposed to the authorities which have just been cited, but there is certainly

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[51] In other jurisdictions, as in New York, for instance, though it is agreed that making a statement as of actual knowledge may amount to a fraud, the court makes it clear that this can only be when the defendant not only does not in fact know the truth of what he asserts, but is conscious that he does not know it. Hadcock *v.* Osmer, 153 N. Y. 604. So in Corey *v.* Boynton, 82 Vt. 257. This accords with the English doctrine.

[52] Holcomb *v.* Noble, 69 Mich. 396, citing Baughman *v.* Gould, 45 Mich. 483; Converse *v.* Blumrich, 14 Mich. 109; Steinbach *v.* Hill, 25 Mich. 78; Webster *v.* Bailey, 31 Mich. 36; Starkweather *v.* Benjamin, 32 Mich. 305; Beebe *v.* Knapp, 28 Mich. 53.

[53] Aldrich *v.* Scribner, 154 Mich. 23.

[54] Sec. 1710, 2.

[55] Civil Code, sec. 5073, 2.

[56] Civil Code, sec. 5388, 2.

[57] Civil Code, sec. 1293, 2.

enough authority to put the bench and bar upon inquiry as to the intrinsic merit of the proposition that one who makes a positive statement of fact in regard to a matter about which he may reasonably be supposed to have special means of information, and makes the statement for the purpose, or apparent purpose, of inducing another to enter into a business transaction, is liable if the statement is false.

The use of the words "fraud" and "deceit" have probably exercised an unfortunate influence in the development of the law on the subject. These words naturally import consciously dishonest conduct on the part of the defendant. Moreover, the difficulty in extending the limits of liability beyond cases where the defendant is consciously dishonest has been increased by the objection of modern judges and lawyers to the use of fiction in expressing the law. Conclusive presumptions are not now much favored, and such terms as " constructive fraud " and " legal fraud " share the disfavor into which conclusive presumptions of fraud have fallen. This disposition is certainly not to be quarreled with. It is better to state the law in terms which will give rise to as little misunderstanding as possible; but the result reached by means of fictitious statement must not be discarded with the fiction when, as has commonly been the case with fictions in the law, the result reached is desirable though the mode of statement is confusing.

The real issue which should be discussed is thus constantly obscured by the terminology of the subject. The real issue is no less than this: When a defendant has induced another to act by representations false in fact though not dishonestly made, and damage has directly resulted from the action taken, who should bear the loss?

In considering which doctrine is the better, consideration should be given chiefly to two things. First: logical consistency with itself in all parts of the law governing misrepresentation. Secondly: the inherent justice of the rule proposed. That the law of misrepresentation as laid down in Derry *v.* Peek is hopelessly inconsistent with the law governing misrepresentation when relied on as the basis of warranty or estoppel, can hardly be denied. Adherence to what may be regarded as established English doctrine in deceit, estoppel, and warranty is absolutely illogical, and with simplified pleading becomes nearly, if not quite, impossible. It

is a just ground of reproach to the law if a harmonious doctrine cannot be developed.

The inherent justice of the severer rule of liability which in some cases at least holds a speaker liable for damages for false representations, though his intentions were innocent and his statements honestly intended, is equally clear. However honest his state of mind, he has induced another to act, and damage has been thereby caused. If it be added that the plaintiff had just reason to attribute to the defendant accurate knowledge of what he was talking about, and the statement related to a matter of business in regard to which action was to be expected, every moral reason exists for holding the defendant liable.

The precise limits of liability in damages for honest misrepresentation are not fixed at the same place by all the courts which hold that such liability may exist. Two qualifying principles may claim some support in authority or reason. The first of these finds support in the early law, in the dissenting opinion in Pasley *v.* Freeman, and in sundry expressions in modern decisions, as in Michigan.[58] This principle would confine liability to cases where the misrepresentation was made to induce another to enter into a contract with the person making the misrepresentation, and would be consistent with the modern law of seller's warranty, and indeed would find its chief support in cases relating to sales. On the other hand, the principle, though not inconsistent with most decisions relating to the implied warranty by an agent of his authority, since most of them relate to cases where the agent purported to enter into a contract, has been expressly repudiated by the House of Lords as a limitation on the agent's liability.[59] Further, there is no such limitation to liability for misrepresentation created by means of an estoppel, and in the action of deceit the authority, both of courts which approve of Derry *v.* Peek and of courts which do not, gives little support for a distinction between representations which induce a contract with the person making them and representations which induce a contract with another person, or indeed any other detrimental action. Nor is it easy to see on logical or ethical grounds why such a distinction should be made.

The second qualifying principle suggested is that no liability

[58] Aldrich *v.* Scribner, 154 Mich. 23.

[59] Starkey *v.* Bank of England, [1903] A. C. 114.

should exist if there was reasonable ground for believing that the statements made were true. This amounts in effect to denying liability unless the statement was made negligently, though it is not, in terms at least, an adoption of the action on the case for negligence for carelessly spoken words. A court might indeed adopt this qualifying principle without holding doctrines of contributory negligence applicable. The statutes of California and other states cited above excuse a defendant from liability if he had reasonable ground for believing his statement to be true. A similar doctrine seems to exist in North Carolina.[60] It is certainly by no means clear that the courts of these states would put the whole subject on the footing of a duty to use reasonable care in regard to spoken or written words.

It has, however, been ably urged that, subject to appropriate limitations, an action on the case for negligence is properly applicable to misrepresentations made carelessly but not dishonestly.[61] Doubtless under any theory of liability which excludes dishonesty as a necessary element of the cause of action it will generally be found that a defendant who is held liable has been guilty of culpable negligence. But there are objections to throwing the whole matter into the law of negligence, and treating spoken words in the same way that acts are treated. In the first place, the law of liability for false representations has grown up on other lines than the law of negligence. There is a violation of historical continuity in forcing the two together. This should not be an insuperable obstacle if logic and practical convenience demanded the joinder, but this does not seem true. Neither the law of warranty nor that of estoppel is based on negligence, so that no general consistency of the law governing misrepresentation would be attained. Furthermore, if negligence is to be the basis of liability for words regarded from the standpoint of misrepresentation, the same test should logically be applied to defamatory words; but the whole law of defamation is inconsistent with any application of the law of negligence to either spoken or written words, for the law governing defamation "is not a law requiring care and caution in greater or less degree, but a law of absolute responsibility qualified by absolute excep-

[60] See cases cited in note 47, p. 431.

[61] Judge Smith, 14 HARV. L. REV. 184, cited and followed in Cunningham *v.* C. R. Pease Co., 74 N. H. 435.

tions." [62] It is also an objection that if an action for negligent misrepresentation as such were permitted, it would be necessary to limit somewhat arbitrarily the scope of the action; for it is probably true, as has often been said, that to hold every man liable for the consequences of words carelessly spoken would be to impose a degree of liability beyond what is reasonable. Again, the doctrine of contributory negligence would be troublesome to apply. Is it contributory negligence for a man to rely on what he is told by a person in a position to know, and to fail to make an investigation for himself? Though many decisions require that a plaintiff should not have been too foolish in believing what no reasonable man in his position should believe, it is going too far, both in reason and on the authorities, to say that a plaintiff, unless his conduct was not wholly irrational, should lose his rights because he failed to make independent investigation and believed what he was told. It should not lie in the mouth of the man who induced his reliance to assert that the reliance was negligent.[63] If a man makes a statement in regard to a matter upon which his hearer may reasonably suppose he has the means of information, and that he is speaking with full knowledge, and the statement is made as part of a business transaction, or to induce action from which the speaker expects to gain an advantage, he should be held liable for his misstatement. Such a principle most nearly harmonizes the law of misrepresentation in its various aspects.

To avoid misapprehension it should be added that where a person is because of a contract of employment under a duty to speak, as by making a report or giving an opinion as an expert, the law of negligence governs his liability. "As a consequence of his contract of employment the law throws the risk of his statements upon him at an earlier point than it would do otherwise. But for the contract he would not be liable for statements unless fraudulent, or for advice unless dishonest." [64]

The idea that a consciously dishonest state of mind is essential for an action of tort for deceit leads to other consequences than decisions that the statement made by the defendant must be known

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[62] Pollock, Torts, 8 ed., 553 n. See also Peck *v.* Tribune Co., 214 U. S. 185.

[63] Goodale *v.* Middaugh, 8 Colo. App. 223, 231; Gerner *v.* Mosher, 58 Neb. 135; Bower *v.* Fenn, 90 Pa. 359; Krause *v.* Busacker, 105 Wis. 350.

[64] Corey *v.* Eastman, 166 Mass. 279, 287, per Holmes, J.

by him to be false. For instance, if the defendant makes a statement which is false if his words are given the natural meaning which his hearer would give them, but which are true if taken in some unnatural sense which he himself put upon them, there is no dishonesty in the defendant, even though he knew that the facts did not accord with the natural meaning of his words, provided that natural meaning did not occur to him. Both in England and in Massachusetts it has been held that under these circumstances a defendant is not liable.[65]

In the Massachusetts decision the dissenting opinion of Holmes, J., in which Field, C. J., concurred, is a very effective argument against the view of the majority of the court. It seems odd that in Massachusetts, where it has been held since, as well as before, the decision in question, that a man who positively asserts as facts matters about which he should be expected to know, is liable, although he thinks he knows, it should also be held that a man who asserts what is false, and what he knows is false, if his words be taken in their natural meaning, may, if he used them in an unnatural sense, prove this and so escape liability.

There seems no reason whatever for not holding a defendant for the natural consequences of his actions when the question involved relates to tort as well as when it relates to contract. In the formation of contracts the parties are rightly held to the natural meaning of what they say. It can only be the idea, induced by the words "fraud" and "deceit," that conscious dishonesty is necessary which can have brought about a different result in an action of tort.

In England the courts have gone still farther in consequence of the doctrine that a guilty state of mind is a necessary element in order to make the defendant liable. Both in Derry *v.* Peek [66] and in Angus *v.* Clifford [67] the court held that no recovery could be had though the defendants made statements which were untrue and which it is absolutely impossible to suppose they did not know were untrue. On the most favorable view the courts simply did not think that the untruth was believed to be of any importance by the defendants, who therefore had no intent to defraud if that

[65] Derry *v.* Peek, 14 App. Cas. 337; Angus *v.* Clifford [1891], 2 Ch. 449 (Ct. App.) Nash *v.* Minnesota Title & Trust Co., 163 Mass. 574.

[66] 14 App. Cas. 337.

[67] [1891] 2 Ch. 449 (Ct. App.).

word be used in the sense naturally given to it. In Derry *v.* Peek the defendants stated that their company had a right to use steam motive power for its cars. In fact the defendant directors confidently expected to get that right, but that all of them supposed, or could have supposed, that they actually had it is incredible. Lord Bramwell alone squarely faced and justified all that was involved in the decision of the court. He said:

"It is also certain that the defendants knew what the truth was, and therefore knew that what they said was untrue. But it does not follow that the statement was fraudulently made. . . . A man may know it [the truth], and yet it may not be present to his mind at the moment of speaking; or if the fact is present to his mind, it may not occur to him to be of any use to mention it." [68]

So in Angus *v.* Clifford the defendant stated that a certain published report of an expert on the company's property had been made for the directors. In fact the report had not been made for the directors, but for the promoters who sold the property to the company. It is impossible to suppose that the directors did not know this. Some members at least of the court tried to rest the case on the ground that the defendants were not using the published words of the prospectus in the natural sense in which the plaintiff understood them; but that "made for the directors" can by anybody ever have been supposed to mean "made for some one else" is absurd, and all members of the court lay stress on the point that the defendants did not regard the misrepresentation of fact as "important." If conscious dishonesty on the part of the defendant is a necessary element of tort for misrepresentation these decisions are right, but they represent a distinctly lower standard of morality and justice than the contrary decisions.[69] Moreover, the standard which they adopt is very difficult to apply. A defendant who is charged with false representations, and who can escape by making out that his intentions were honest though his words naturally understood were false, will rarely fail to testify to his own honesty of intention. The issue thus raised of the de-

[68] 14 App. Cas. 337, 348.

[69] In Grosh *v.* Ivanhoe Land Co., 95 Va. 161, the vendor of town lots falsely represented that railroads and other enterprises were established in the town. He was held none the less liable because he believed that they soon would be. See also Whiting *v.* Price, 169 Mass. 576.

fendant's state of mind is difficult to try, and attempts at its decision are quite as likely to promote perjury as justice.

It may properly be urged that the measure of damages in an action for deceit differs from that applicable to actions for breach of warranty or to actions based on estoppel. In an action of tort for deceit it may be said that the law should endeavor to place the plaintiff in as good a position as he would have been in had no tort been committed; that is, if the plaintiff had not entered into the bargain at all. On the other hand, for misrepresentation which amounts to a warranty or estoppel the defendant is compelled to place the plaintiff in as good a position as he would have been in had the misrepresentation been true. Undoubtedly this difference in theory exists, though as matter of fact the weight of authority in this country gives the plaintiff the same measure of damages in tort for deceit as it gives for breach of warranty.[70] But the vital question concerns liability and not the measure of damages for it. If it be granted that the defendant should be liable for honest misrepresentation to the extent suggested, it is of little comparative importance whether the liability should be to make the representation good, or to make good the loss incurred by reliance upon it. There is authority for either way of dealing with the liability.

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[70] See Williston, Sales, sec. 613.